FILED

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No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

LORRAINE LODER,
Petitioner,

vs.

CITY OF GLENDALE, et al.,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT
OF THE STATE OF CALIFORNIA

PETITION FOR WRIT OF CERTIORARI

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238pp

QUESTION PRESENTED

Did the California Supreme Court act in a manner contrary to the requirements of the Fourth Amendment described by this Court in *Skinner v. Railway Labor Executives Ass'n.*, 489 U.S. 602 (1989) and *National Treasury Employees Union v. Von Raab*, 489 U.S. 656 (1989)? The California Supreme Court permitted a government employer's drug testing program, which applies to all newly hired employees, without regard to job duties, and without any suspicion of drug use by the individuals being tested.

TABLE OF CONTENTS

QUESTION PRESENTED i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES iv

LIST OF PARTIES (Rule 14.1(b)) vi

PETITION FOR WRIT OF CERTIORARI 1

OPINIONS BELOW 2

JURISDICTION 2

CONSTITUTIONAL PROVISION INVOLVED 3

STATEMENT OF THE CASE AND RELEVANT FACTS 3

A. The Drug Testing Program 3

B. Procedural History 5

1. Proceedings In The Superior Court . . . 5

2. Proceedings On Appeal 7

WHY CERTIORARI SHOULD BE GRANTED 8

REVIEW IS WARRANTED BECAUSE THE DECISION OF THE CALIFORNIA SUPREME COURT PERMITTING DRUG TESTING OF NEW HIRES BY A GOVERNMENT EMPLOYER WITHOUT ANY INDIVIDUALIZED SUSPICION

AND WITHOUT ANY RELATIONSHIP TO THE FUNCTIONS OF THE JOB IS CONTRARY TO THIS COURT'S HOLDINGS IN *SKINNER V. RAILWAY LABOR EXECUTIVES ASS'N.*, 489 U.S. 602 (1989), AND *NATIONAL TREASURY EMPLOYEES UNION V. VON RAAB*, 489 U.S. 656 (1989). 8

A. United States Supreme Court Decisions Require An Injunction Prohibiting Glendale's Urine Testing In Its Entirety 8

B. The Ruling of the Supreme Court of the State Of California Conflicts With Lower Federal Court Decisions After *Skinner* and *Von Raab* Which Have Limited Drug Testing 11

CONCLUSION 14

APPENDIX

Remittitur (filed February 5, 1997) A-1

California Supreme Court Opinion (filed January 6, 1997) B-1

Court of Appeal Order Modifying Opinion and Denying Rehearing (filed October 20, 1994) C-1

Court of Appeal Opinion (filed September 26, 1994) D-1

Judgement of Superior Court (entered July 13, 1992) E-1

TABLE OF AUTHORITIES

CASES	PAGE(S)
Asarco Incorporated v. Kadish, 490 U.S. 605 (1989)	5
Brown v. Winkle, 715 F.Supp. 195 (N.D. Ohio 1989)	12
Frothingham v. Mellon, 262 U.S. 447 (1923)	5
Georgia Association of Educators v. Harris, 749 F. Supp. 1110 (N.D. Ga., 1990)	12
Harmon v. Thornburgh, 878 F.2d 484 (N.D. Ga., 1990), cert. denied, *Bell v. Thornburgh,* 493 U.S. 1056 (1990)	13
International Brotherhood of Teamsters v. Department of Transportation, 932 F.2d 1292 (9th Cir. 1991)	11
Kemp v. Claiborne County Hospital, 763 F.Supp 1362 (S.D. Miss., 1991)	12
Loder v. City of Glendale, 216 Cal.App.3d 777 (1990)	6
National Treasury Employees Union v. Von Raab, 489 U.S. 656 (1989)	i, 8-13
National Treasury Employees Union v. Watkins, 722 F. Supp. 766 (D.D.C 1989)	13

National Treasury Employees v. Hallett,
756 F. Supp. 947 (E.D. La. 1991) 12

Orr v. Orr,
440 U.S. 268 (1979) 2

Piroglu v. Coleman,
25 F.3d 1098 (D.C. Cir. 1994), cert. denied,
__U.S.__ 115 S.Ct. 1093 (1995) 12

Skinner v. Railway Labor Executives Ass'n.,
489 U.S. 602 (1989) . . . . . i, 8-11, 13

Vernonia School District v. Acton,
__U.S.__, 115 S.Ct. 2386 (1995) 10

Willner v. Thornburgh,
928 F.2d 1185 (D.C. Cir. 1991) 9, 12

STATUTES

28 U.S.C. section 1257 2

Supreme Court Rule 14.1(b) vi

Supreme Court Rule 14.1(h) 2

LIST OF PARTIES (Rule 14.1(b))

The parties to the proceeding below were the petitioner and plaintiff, Lorraine Loder, and defendants, City of Glendale, David Ramsay (City Manager) and John Hoffman (Personnel Director).

No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1996

LORRAINE LODER,
Petitioner,

v.

CITY OF GLENDALE, et al.,
Respondents.

Petition for Writ of Certiorari
To The Supreme Court of the State of California,

PETITION FOR WRIT OF CERTIORARI

Petitioner Lorraine Loder respectfully prays that a writ of certiorari issue to review the judgment and opinion of the Supreme Court of the State of California, entered in the above proceeding on January 6, 1997.

OPINIONS BELOW

The opinion of the Supreme Court of the State of California is reported at 59 Cal.Rptr.2d 696 and is reprinted in the Appendix ("App.") at pages B-1 to B-150, *infra*. The opinion of the Court of Appeal, Second Appellate District, reversed in part and affirmed in part the decision of the trial court, and is reported at 47 Cal.App.4th 592, and is reprinted in the Appendix at pages D-1 to D-36. The judgment of the Superior Court was not reported, and is reprinted in the Appendix at pages E-1 to E-21.

JURISDICTION

The opinion of the Supreme Court of the State of California, was entered on January 6, 1997. App. at B. The remittitur issued from the Supreme Court of the State of California on February 5, 1997. App. at. A-1. The jurisdiction of this Court to review the judgment of the Supreme Court of the State of California, is invoked under 28 U.S.C. section 1257.[1]

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[1]As review of the Supreme Court of the State of California decision reveals, the court squarely addressed the issues concerning the scope of Fourth Amendment protections in the context of the City of Glendale's drug testing program for every person offered a job by the City of Glendale. *Orr v. Orr*, 440 U.S. 268, 274-275 (1979) [state court's resolution of federal question demonstrates federal question properly raised in proceedings]. Moreover, as required by Supreme Court Rule 14.1(h), the statement of the case, *infra*, specifies the stages in the proceedings both in the court of first instance and the appellate courts at which the federal questions sought to be reviewed were raised.

CONSTITUTIONAL PROVISION INVOLVED

Fourth Amendment to the United States Constitution.

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

STATEMENT OF THE CASE AND RELEVANT FACTS

A. The Drug Testing Program

This case presents, in somewhat different form, issues pending before the Court in *Chandler v. Miller*, No. 96-126.

The City of Glendale adopted a drug testing program with the following features: Every employee is tested as a condition of a job offer. It requires testing without regard to the position sought. It requires testing without any reason to suspect that the person to be tested used or abused any drug. It mandates job disqualification for substances which adults may use without regulation (e.g., alcohol) or with a prescription (e.g., valium or phenobarbital), as well as those which may only be used illegally (e.g., heroin). It uses tests which can only show past consumption, which cannot show

anything of the circumstances of consumption, and which cannot show current impairment. It requires the person being tested to waive the right to medical confidentiality, to authorize the release of medical information to the City of Glendale and to provide information concerning current medications and medical and personal history. It requires monitored urination.

When the City of Glendale adopted its drug testing policy on July 23, 1986, it had no evidence of a substantial substance abuse problem in its work force. It had done only one study of drug abuse in the workplace.[2] That study gave weight to those disciplinary decisions which staff merely believed or suspected involved substance use or abuse. Even so, it showed ten or fewer suspected incidents each year. It showed a drop in the absolute number of disciplinary incidents supposedly tied to alcohol or drugs. The only increase (from 1 to 3 incidents) was in the area of pure suspicion. That is, Glendale counted suspected substance involvement which could not be documented.

In implementing its drug testing program, Glendale prepared a summary of purported "job related factors for disqualification." Glendale actually created a "justification" for each and every job position in the city. It included clerical workers, library workers, engineers, professional staff, managers and supervisors. Glendale's justification for

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[2]Glendale's director of employee relations testified at trial that the City conducted what he called a "pilot study" of drug use in a group of job candidates. That testimony is far too vague, and the study far too unscientific to support the privacy invasions which Glendale then imposed.

testing for every position in the city was based on the stated assumption that "Employees at any and all levels in the organization who have drugs and alcohol in their systems are impairing their ability to perform their duties at full, efficient capacity." Emphasis added. The tests used, however, by their own terms purport to measure not the presence of drugs or alcohol, but rather the presence of metabolites, that is, chemical residues after a substance has been broken down by the body. Glendale thus tests for private conduct which may occur outside the workplace and outside working hours.

B. Procedural History

1. Proceedings In The Superior Court

Plaintiff Lorraine Loder filed her original complaint for injunctive relief as a municipal taxpayer September 15, 1986.[3] The original complaint and both amended complaints raised the Fourth Amendment issues presented in this petition. Defendant's demurrer to the original complaint was sustained with leave to amend by order dated December 16, 1986. Plaintiff filed a First Amended Complaint for Injunctive Relief, February 6, 1987. Glendale again demurred. By order dated September 17, 1987, the trial court entered a preliminary injunction prohibiting the City

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[3]Plaintiff has standing as a municipal taxpayer. *Frothingham v. Mellon*, 262 U.S. 447 (1923); *Asarco Incorporated v. Kadish*, 490 U.S. 605 (1989).

of Glendale from carrying out its testing program.[4] Plaintiff filed a Second Amended Complaint and Defendants answered.

In anticipation of trial on the merits, the parties, at the direction of the Superior Court, entered into stipulations of fact, and prepared a joint statement of proposed findings of fact with respect to each category of employment and the validity of the drug testing program.

Limited remaining issues were tried to the court July 22 and 23, 1991.[5] Following extended submissions of proposed statements of decision and related objections and

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[4]Defendants appealed from the preliminary injunction. The Court of Appeal concluded that, as a taxpayer, plaintiff Loder failed to present sufficient evidence that she personally would suffer interim harm. The appellate court therefore reversed the preliminary injunction order without reaching the merits of the City's drug testing program. *Loder v. City of Glendale,* 216 Cal.App.3d 777 (1990). Remittitur was issued February 14, 1990.

[5]None of the live testimony is at issue. The issues on appeal turned on the stipulated facts which were not disputed. Virtually all of the live testimony was plaintiff's evidence of specific computerized tests for impairment of balance, coordination, memory, and reaction time, and defendants' rebuttal to that evidence. The trial court explicitly found that those particular computer alternatives were not adequate. Although plaintiff disagreed with those factual findings — the trial court refused an opportunity to try the computer test — she did not challenge that conclusion on appeal. Glendale's expert on drug testing offered some explanation on an undisputed issue: that drug use can impair an employee's ability to function. The only other testimony was from Glendale's director of employee relations, John Hoffman. His testimony was duplicative of the stipulations of fact, incompetent, or unrelated to the legal standards applicable to the drug testing at issue.

responses, judgment was entered July 13, 1992. (App. E-1) The Superior Court enjoined Glendale's drug testing program as to certain job positions and denied the injunction as to other job positions.

2. Proceedings On Appeal

Plaintiff filed her notice of appeal from the judgment, August 5, 1992. The City of Glendale filed a notice of cross-appeal on or about September 3, 1992.

The Court of Appeal for the State of California reversed the decision of the Superior Court, holding that the City of Glendale's drug testing program violated both the state constitution and the Fourth Amendment to the Constitution of the United States. (App. D-1.)

Defendants filed their Petition For Review with the Supreme Court of the State of California. The California Supreme Court granted review. It issued its opinion January 6, 1997, holding, in relevant part, that the City of Glendale did not violate the Fourth Amendment to the Constitution of the United States, or any independent state protection of privacy, when it required every person hired by the City to submit to urinalysis drug testing as a condition of employment. In part of the decision not challenged by this petition, the California Supreme Court found that the same drug testing program, when applied to promotional candidates, as opposed to new hires, was overbroad and violative of both the Fourth Amendment and the state constitutional right of privacy. The remittitur issued February 5, 1997. (App. at A-1.)

WHY CERTIORARI SHOULD BE GRANTED

REVIEW IS WARRANTED BECAUSE THE DECISION OF THE CALIFORNIA SUPREME COURT PERMITTING DRUG TESTING OF NEW HIRES BY A GOVERNMENT EMPLOYER WITHOUT ANY INDIVIDUALIZED SUSPICION AND WITHOUT ANY RELATIONSHIP TO THE FUNCTIONS OF THE JOB IS CONTRARY TO THIS COURT'S HOLDINGS IN *SKINNER V. RAILWAY LABOR EXECUTIVES ASS'N.*, 489 U.S. 602 (1989), AND *NATIONAL TREASURY EMPLOYEES UNION V. VON RAAB*, 489 U.S. 656 (1989).

A. United States Supreme Court Decisions Require An Injunction Prohibiting Glendale's Urine Testing In Its Entirety

Drug testing by urinalysis is a search subject to Fourth Amendment standards. *Skinner v. Ry. Labor Executives Ass'n.*, 489 U.S. 602 (1989). This Supreme Court defined the standard for evaluating Fourth Amendment attacks on drug testing: the search must be reasonable in light of "all the circumstances surrounding the search or seizure and the nature of the search or seizure itself." The search is then "judged by balancing its intrusion on the individual's Fourth Amendment interests against its promotion of legitimate governmental interests." *Id.* at 489 U.S. 619.

Glendale violates even the narrowly drawn Fourth Amendment protection established by *Skinner*, and by its companion case, *National Treasury Employees Union v. Von Raab, supra.*

The Court in *Skinner*, upheld drug testing in the railroad industry, because there was evidence that substance abuse was an actual and widespread problem in the industry, because the workers tested held lives in their hands, because the testing was triggered by specific events (accidents and safety violations), because the urine sample was taken without direct observation, because the industry was highly regulated thus diminishing a worker's expectations of privacy, and because a urine test alone was not used to show current impairment.

In every respect, Glendale's testing program, permitted by the California Supreme Court, is different from that in *Skinner*, and is more intrusive. Glendale does not limit the testing to safety positions. It made no evidentiary showing of a serious workplace substance abuse problem. It tests without regard to triggering events. The City of Glendale is not a highly regulated industry. Glendale requires observation of urination. In *Willner v. Thornburgh*, 928 F.2d 1185 (D.C. Cir. 1991), relied on by Glendale, the Court treated both visual and aural observation as significant and unwarranted intrusions on personal dignity.

In *Von Raab*, this Court considered suspicionless testing of government customs office employees. It held that the Fourth Amendment applies even when the government acts as an employer. *Von Raab, supra* at 489 U.S. at 656. While the Court upheld testing of employees who handled weapons and of employees directly involved in the interdiction of illegal drugs, it refused to approve testing of employees based on the broad assertion that they handled classified or sensitive materials. This Supreme Court recognized that drug testing might be appropriate as part of

a security clearance like procedure. However, it returned the case to the lower courts for specific fact finding on the need for testing across the range of positions which the government had sought to test. The Court specifically voiced skepticism and concern over testing of people in the positions of accountant, accounting technician, attorney, baggage clerk, co-op student, electric equipment repairer, mail clerk/assistant and messenger. *Von Raab, supra*, 109 S.Ct. at 1397.

There are an extremely limited number of positions which are safety critical as defined in *Von Raab*: where employees "discharge duties fraught with such risk of injury to others that even a momentary lapse of attention can have disastrous consequences." *Von Raab*, 489 U.S. at 670 (emphasis added). Further, for the jobs where safety concerns might support some kind of testing, the availability of less intrusive and more accurate testing of current impairment precludes Glendale's urinalysis program.

This Supreme Court's recent decision, *Vernonia School District v. Acton*, __U.S.__, 115 S.Ct. 2386 (1995), affirmed the Fourth Amendment principals of *Skinner* and *Von Raab*, when it distinguished testing of student athletes. It noted that students would have less than full Fourth Amendment protections and that student athletics were voluntary and, unlike employment, not an essential part of the school's enterprise.

Glendale's testing program falls into the very categories of testing condemned in *Von Raab*. Glendale would test without regard to the particular needs of the job. It tests a range of positions which is clearly overbroad. It

tests without any showing that safety or critical confidential information is at risk.

Finally, and critical here, this Supreme Court established legal standards which define safety sensitive jobs and so limit a trial court's fact finding in order to enforce the Fourth Amendment. The California Supreme Court simply ignored those standards in permitting across the board testing for every job in the City of Glendale.

B. The Ruling of the Supreme Court of the State Of California Conflicts With Lower Federal Court Decisions After *Skinner* and *Von Raab* Which Have Limited Drug Testing

Following *Skinner* and *Von Raab*, federal courts have limited the classes of employees who may be tested to those who: (1) are engaged in duties which would clearly be adversely affected by drug use and which specially require the utmost integrity; (2) "discharge duties fraught with such risks of injury to others that even a momentary lapse can have disastrous consequences" *Von Raab*, 489 U.S. at 670; and (3) handle truly sensitive information. In each case, the court limited the number of employees tested and prohibited testing of employees whose work is far more "sensitive" than that of most Glendale employees.

Federal courts which have approved drug testing of applicants for specific jobs, in light of *Skinner* and *Von Raab*, have consistently relied on a direct relationship between the specific job requirements and the drug test. *International Brotherhood of Teamsters v. Department of Transportation,* 932 F.2d 1292 (9th Cir. 1991) (truck

drivers); *Piroglu v. Coleman,* 25 F.3d 1098 (D.C. Cir. 1994), *cert. denied,* __U.S.__ 115 S.Ct. 1093 (1995) (emergency medical technician); *Kemp v. Claiborne County Hospital,* 763 F.Supp 1362 (S.D. Miss., 1991) (surgical scrub technician); *Brown v. Winkle,* 715 F.Supp. 195 (N.D. Ohio 1989) (firefighter). In all of these cases, the critical factors were the safety requirements of the job and the highly regulated nature of the particular job. *Willner v. Thornburgh,* 928 F.2d 1185 (D.C. Cir. 1991), relied on by Glendale, is unique in using applicant status to permit testing. That analysis drew a cogent dissent from Judge Henderson.

In a case involving drug testing of applicants for a range of jobs (in contrast to the *Willner* court's focus on testing for high level Justice Department jobs) a federal district court rejected general rationales, such as those offered by Glendale, here, and enjoined the enforcement of Georgia's Applicant Drug Screening Act. *Georgia Association of Educators v. Harris,* 749 F. Supp. 1110 (N.D. Ga., 1990).

In its arguments before the state courts, Glendale wrongly suggested that, on remand, *Von Raab* permitted unfettered testing of government employees. In fact, the district court limited testing to custom employees with security clearances after a detailed review of the procedures for identifying such positions. The holding relied on the threat to national security. The district court recognized that positions including accountant, animal caretaker and electric equipment repairer were not confidential positions and not subject to testing. *National Treasury Employees v. Hallett,* 756 F. Supp. 947, 949, note 2 (E.D. La. 1991).

In *Harmon v. Thornburgh,* 878 F.2d 484 (D.C. Cir. 1989), *cert. denied, Bell v. Thornburgh,* 493 U.S. 1056 (1990), the court limited testing of justice department employees, including federal prosecutors with access to grand jury proceedings. The court rejected the government's legitimate interest in having its employees obey the law, finding such an interest insufficient, by itself, to justify suspicionless testing. It also held that the government's general interest in preserving secrets, was not sufficient to justify testing every employee.

The district court in *National Treasury Employees Union v. Watkins,* 722 F. Supp. 766 (D.D.C 1989), invalidated drug testing of motor vehicle operators, some of whom carried firearms, and of communication specialists transmitting sensitive information belonging to the Department of Energy.

California's current interpretation of the Fourth Amendment thus stands in marked contrast to the consistent federal authority beginning with *Skinner* and *Von Raab.*

CONCLUSION

For the foregoing reasons, petitioner submits the petition for certiorari should be granted.

March 31, 1997 Respectfully submitted,

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APPENDIX A

IN THE SUPREME COURT OF THE
STATE OF CALIFORNIA

*** R E M I T T I T U R***

TO THE COURT OF APPEAL, SECOND APPELLATE DISTRICT DIVISION: FOUR

LORRAINE LODER,	)	FILED
	)	February 5, 1997
Plaintiff and Appellant,	)	
	)	S043548
v.	)	Ct. App. B069565
	)	
CITY OF GLENDALE, et al.,	)	Los Angeles County
	)	Super. Ct. No.
Defendants.	)	C616659

I, ROBERT F. WANDRUFF, CLERK OF THE SUPREME COURT OF THE STATE OF CALIFORNIA, DO HEREBY CERTIFY THAT THE ATTACHED ARE COPIES OF THE ORIGINAL JUDGMENT NOW FINAL ENTERED IN THE ABOVE-ENTITLED CAUSE ON MONDAY, THE 6TH DAY OF JANUARY, 1997.

COSTS, IF ANY, SHALL BE AWARDED BY THE COURT OF APPEAL.

WITNESS MY HAND AND SEAL OF THE COURT,

WEDNESDAY, THE 5TH DAY OF FEBRUARY, 1997.

ROBERT F. WANDRUFF,
CLERK

BY HENRIETTA A. CRUZ
DEPUTY